



Senate Fiscal Agency
P.O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986

House Bills 4909 through 4912 (Substitute S-1)
Sponsor: Representative Kelly Breen (H.B. 4909)
Representative Penelope Tsernoglou (H.B. 4910)
Representative Graham Filler (H.B. 4911)
Representative Ken Borton (H.B. 4912)
House Committee: Judiciary
Senate Committee: Civil Rights, Judiciary, and Public Safety

Date Completed: 6-20-24

INTRODUCTION

The bills would modify the requirements for guardians of legally incapacitated individuals and conservators of minors or individuals considered in need of legal protection under the Estates and Protected Individuals Code (EPIC). (For more information on guardians and conservators see **BACKGROUND**.) They would prescribe suitability requirements for, and accordingly modify appointment priority of, guardians and conservators. Additionally, they would modify the duties of a guardian ad litem (GAL), which is generally a guardian appointed by a court to handle a specific case concerning a legally incapacitated individual; they would retain many of the duties to communicate with the individual, explain legal proceedings, identify the individual's preferences, and submit reports to the court but would expand information required to be communicated and reporting requirements depending on steps in the guardian-appointment process. The bills also would modify guardian visitation requirements, require guardians to maintain a ward's permanent place of residence whenever possible, and prescribe the steps a guardian would have to take to modify the ward's residence.

Related to wards under guardianships or conservatorships, the bills would modify the procedures to determine incapacity and specify that the evaluations to do so would have to be reported to the court. They would allow a court to appoint a temporary guardian for up to six months if a guardian were not effectively performing the guardian's duties and the ward's welfare required immediate attention. Finally, they would allow a ward or interested party to petition for the removal of a conservatorship.

The bills are tie-barred, and each bill would take effect 365 days after its enactment.

BRIEF FISCAL IMPACT

The bills would have an indeterminate fiscal impact on the State and local court systems. It is not known whether the bills would increase case filings or court administration costs for the assignment of guardians or conservators.

MCL 700.5104 et al. (H.B. 4909)
700.5305 et al. (H.B. 4910)
700.5303 et al. (H.B. 4911)
700.5414 et al. (H.B. 4912)

Legislative Analyst: Eleni Lionas
Fiscal Analyst: Joe Carrasco, Jr.
Michael Siracuse

CONTENT

House Bill 4909 (S-1) would amend EPIC to do the following:

- Allow an interested person to file for notification of an order in a guardianship hearing for a temporary guardian as proposed under House Bill 4912 (S-1).
- Delete a provision specifying that a professional guardian or employee of the guardian would have to establish and maintain visitation appointments every three months.
- Allow a professional guardian or professional conservator to use support staff and other professionals, under the professional's active and direct supervision, to perform office functions and client services, but prohibit the delegation of decision-making authority to support staff.
- Require a court appointed guardian and court appointed conservator to meet certain suitability requirements prior to being considered eligible for priority appointment.
- Require a court to decide between two potential guardians or conservators of equal priority by using the proposed suitability requirements.
- Allow for the appointment of co-guardians or co-conservators in deciding between two individuals with equal priority.
- Allow a court to appoint a professional guardian if no guardian were designated or were suitable and willing to serve subject to priority appointment guidelines.
- Prescribe requirements for, and expiration dates of, letters of conservatorship.

House Bill 4910 (S-1) would amend EPIC to do the following:

- Modify the duties of a GAL appointed to a guardianship for an incapacitated individual and a GAL appointed to a conservatorship for a protected individual.
- Require a GAL to communicate specific information with the incapacitated individual, including the individual's rights, the hearing procedures, and the GAL's power to take certain actions on behalf of the individual.
- Require a GAL to file a written report with the court in a form required by the State Court Administrative Office (SCAO) for contested and uncontested cases, and serve the report on interested persons.
- Prohibit a court from appointing a GAL as legal counsel for an individual if the GAL's report or recommendation to the court conflicted with the individual's wishes.
- Allow for the appointment of a special limited GAL and prescribe that guardian's scope of work.
- Require a court to appoint legal counsel for an individual subject to a petition under Part 3 (Guardians of Incapacitated Individuals) if the individual requested the legal counsel, objected to guardianship, or a GAL determined it was in the individual's best interest.
- Require the State pay for legal counsel of an individual who was alleged to be incapacitated and indigent.
- Modify guardian visitation requirements to specify that a guardian would have to visit the ward within a month of appointment and at least once within three months after each visit, among other things.
- Allow a guardian who was not a professional guardian to delegate in person visits to another individual.
- Require a guardian or a conservator to make an inventory of a ward's estate and personal and sentimental items and serve the list of items to all interested persons within 56 days of appointment.

- Require a guardian responsible for a ward's estate when a conservator was not appointed to allow interested persons to review certain proofs of income and disbursements.
- Require a guardian to maintain a ward's permanent residence if possible and make all reasonable efforts to return the ward to his or her residence if the ward were removed.
- Prescribe certain requirements to establish a change in a ward's residence.
- Require a guardian to file a petition for permanent removal of a residence and prescribe the process for a hearing of that petition.
- Require a conservator to account certain information about the administration of a ward's trust, financial records, documentation of significant expenses, and how the ward's personal items were handled to the court and interested persons within 56 days of the conservatorship's termination.

House Bill 4911 (S-1) would amend EPIC to do the following:

- Modify the requirements for a petition to determine an individual incapacitated to require the court to set a date for an initial hearing and then set a trial date within seven days of the initial hearing.
- Specify that if an independent evaluation to determine an individual's incapacity were performed at the expense of the State, due to indigency, the evaluation would have to be performed by a physician or mental health professional.
- Modify the requirements of an examination report following a medical professional's evaluation to determine incapacity and specify that a court could not consider the evaluation if the report did not comply with certain requirements.
- Specify that a court could order a temporary guardianship with limited scope if the court found that the individual had the capacity to execute a power of attorney, patient advocate designation, or designate a representative payee.
- Modify the process to declare an emergency guardian to allow an interested person to file a petition for emergency guardian appointment, among other changes.
- Prescribe the hearing procedures to appoint an emergency guardian and allow the court to appoint one either after a hearing or without notice to the allegedly incapacitated individual depending on the evidence presented.

House Bill 4912 (S-1) would amend EPIC to do the following:

- Allow a court to appoint a temporary guardian if a guardian were not appointed, or an appointed guardian were not effectively performing the guardian's duties and the ward's welfare required immediate attention.
- Require a temporary guardian, once appointed, to undergo a trial period within 28 days after the guardian's appointment.
- Specify that a court would have to set a specified period for the temporary appointment that could not exceed six months.
- Allow a protected individual or person interested in the individual's welfare to petition for an order of removal of a conservator, appointment of a successor, or for an order of modifying the conservatorship.
- Specify that the appointment of conservators would be subject to priority appointment as described under **House Bill 4909 (S-1)**.

House Bill 4909 (S-1)

Notification of Court Order

Under EPIC, an interested person who wishes to be notified before an order is made in a guardianship proceeding must file a request for notice with the register of the court in which the proceeding is pending with the attorney of record, or if none, with the guardian or conservator, if any. Under the bill, this provision also would apply to temporary guardians as proposed under House Bill 4912 (S-1).

Professional Licensure

Under EPIC, a professional guardian must establish and maintain a schedule of visitation so that an individual associated with the professional guardian who is responsible for the ward's care visits the ward within three months after the professional guardian's appointment and not less than once within three months after each previous visit. The bill would delete this provision.

Use of Support Staff

Under the bill, a professional guardian or professional conservator could use support staff and other professionals, under the professional's active and direct supervision, to perform office functions and client services. Support staff and professionals could be used to gather and provide necessary information to the professional regarding a ward or protected individual and to make recommendations to the professional based on their knowledge and expertise. The professional guardian or professional conservator could not delegate decision-making authority to support staff, a professional, or another person regarding financial decisions or decisions requiring informed consent, including medical, mental health, placement, or care planning decisions.

Guardian Appointment Requirements and Priority

A court may appoint a competent person as guardian of a legally incapacitated individual. The bill would specify that this appointment would be subject to the requirements as described above, as applicable.

The court must not appoint a guardian that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual. The bill would specify that the court could not appoint a guardian that benefited from *providing* housing, medical, mental health, *caregiving*, or social services to the individual, instead of *directly* providing.

Generally, a court must appoint a person, if suitable and willing to serve, in a specific order of priority described below. The bill would prescribe suitability requirements that an individual would have to meet as a condition of eligibility prior to appointment priority guidelines. The court would have to appoint a person with priority guardian of a legally incapacitated individual unless specific findings on the record indicated that the person was not suitable as set forth below or was not willing to serve. A person would be suitable to serve on determination of specific findings of the court, including all the following factors:

- The preference of the individual subject to guardianship, including who should serve and not serve as the guardian.
- The person's availability to the individual subject to the guardianship.
- The person's history and relationship with the individual subject to the guardianship.

- The person's criminal history that was relevant to the care, custody, and control of the individual subject to the guardianship.
- The person's personal history, including employment, training, skills, and stability that would facilitate fulfillment of duties.
- The person's ability to meet the requirements of Section 5410, which allows a court to require a conservator to furnish a bond, if applicable.
- The person's ability to advocate appropriately for the best interests of the individual subject to the guardianship with healthcare and service providers.

Additionally, the specific findings would have to include the person's ability to fulfill duties regardless of interpersonal disputes between interested persons or others with interests in the welfare of the individual subject to guardianship. Interpersonal disputes alone could not be the basis for finding a person with priority unsuitable unless the court found by clear and convincing evidence that no other person was able to fulfill the duties.

In appointing a guardian, the court must appoint a person, if suitable and willing to serve, in the following order of priority:

- A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual.
- A person the individual subject to the petition chooses to serve as guardian.
- A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.
- A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

Under the bill, in deciding between two individuals with equal priority described above, the court would have to weigh the suitability factors with specific findings on the record. The court could appoint two individuals to serve as co-guardians. Unless the order of appointment and letters of guardianship stated otherwise, co-guardians would have to act jointly; however, a co-guardian could delegate authority to the other co-guardian under Section 5103, which prescribes the delegation of powers by a parent or guardian.

Under EPIC, if there is no person chosen, nominated, named, or suitable or willing to serve under the provision described above, the court may appoint a guardian who is related to the individual who is the subject of the petition in the following order:

- The legally incapacitated individual's spouse, including a person nominated by will or other writing signed by a deceased spouse.
- An adult child of the legally incapacitated individual.
- The parent of the legally incapacitated individual, including a person nominated by will or other writing signed by a deceased parent.
- A relative of the legally incapacitated individual with whom the individual has resided for more than six months before the filing of the petition.
- A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

The bill would specify that letters of guardianship would have to expire within 15 months after the date of appointment, and the expiration date would have to be printed on the letters. Letters of guardianship could not be reissued to a guardian that failed to report the condition of the ward to the ward's estate that was subject to the guardian's possession or control, as required by the court. The probate register could reissue letters of guardianship without a hearing.

If no person is designated or listed on the priority order lists as suitable or willing to serve, the court may appoint a competent person as guardian, including a professional guardian.

Removal or Termination of Guardian

Under EPIC, a ward or person interested in the ward's welfare may petition for an order removing the guardian or appointing a successor guardian. Except as otherwise provided in the order finding incapacity, upon receiving a petition, the court must set a hearing within 28 days of receipt. The bill would specify that a petition for an order appointing a successor guardian would be subject to the priority of appointment described above.

An order finding incapacity may specify a minimum period, with a maximum of 182 days, during which the petition or request for a finding that a ward is no longer an incapacitated individual, or for an order of modification or removal of a guardian must not be filed without special leave of the court. The bill would delete this provision.

Conservator Appointment Priority

Under EPIC, the court may appoint an individual, a corporation authorized to exercise fiduciary powers, or a professional conservator to serve as conservator of a protected individual's estate in the following order of priority:

- A conservator, guardian of property, or similar fiduciary appointed or recognized by the appropriate court of another jurisdiction in which the protected individual resides.
- An individual or corporation nominated by the protected individual if he or she is 14 years of age or older and of sufficient mental capacity to make an intelligent choice, including a nomination made in a durable power of attorney.
- The protected individual's spouse.
- An adult child of the protected individual.
- A parent of the protected individual or a person nominated by the will of a deceased parent.
- A relative of the protected individual with whom he or she has resided for more than six months before the petition is filed.
- A person nominated by the person who is caring for or paying benefits to the protected individual.

The bill would delete references to *an individual or corporation* nominated by the protected individual to instead refer to a person.

If none of the individuals listed above are suitable and willing to serve the court may appoint a person the court determined to be such. Under the bill, the court would have to appoint a person with priority as conservator of a protected individual's estate unless specific findings on the record indicated that the person was not suitable as described below or was unwilling to serve. A person would be suitable to serve on determination of specific findings of the court, including all the following factors:

- Preference of the individual subject to conservatorship, including who should serve and not serve as conservator.
- Availability to the individual subject to the conservatorship.
- History and relationship with the individual subject to the conservatorship.
- Criminal history that was relevant to the role of a conservator.
- Personal history, including employment, training, skills, and stability that would facilitate fulfillment of duties.

- Ability to fulfill duties regardless of interpersonal disputes between interested persons or others with an interest in the welfare of the individual subject to conservatorship; interpersonal disputes alone could not be the basis for finding a person with priority was unsuitable.
- Ability to meet the requirements of Section 5410, which allows a court to require a conservator to furnish a bond.

Currently, if persons have equal priority, the court must select the person the court considers best qualified to serve. Acting in the protected individual's best interest, the court may pass over a person having priority and appoint a person having a lower priority or no priority. The bill would delete these provisions.

Instead, in deciding between two persons with equal priority, the court would have to weigh the suitability factors with specific findings on the record. The court could appoint a maximum of two individuals to serve as co-conservators. Unless the order of appointment and letters of conservatorship stated otherwise, co-conservators would have to act jointly. Letters of conservatorship would have to expire within 15 months after the date of appointment. The expiration date would have to be printed on the letters of conservatorship. Letters of conservatorship could not be reissued to a conservator that failed to account to the court as required under Section 5418, which generally requires a conservator to account to the court for administration of the trust at least annually. The probate register could reissue letters of conservatorship without a hearing.

House Bill 4910 (S-1)

Guardian Ad Litem Duties

Generally, a GAL is a person appointed by a court to protect a legally incapacitated individual, or in many cases for the care of a minor, for a specific case. Under EPIC, the duties of a GAL appointed when an individual is alleged to be incapacitated generally include visitation requirements, understanding and explaining the legal process and the individual's legal rights, gathering information about the individual's estate, and making determinations regarding the individual's wishes or objections. The bill would delete the current duties of a GAL.

Instead, under the bill, a GAL would be responsible for the following duties:

- Impartially gathering information as provided by law.
- Seeking information from the individual and, if communication were possible, communicate in a manner the individual was best able to understand or if communication were not possible or there was a barrier to communication, note that in the report described below.
- Interviewing the individual in person at the individual's location and out of the presence of any interested person.
- Advising the individual that the GAL did not represent the individual as an attorney and that no attorney-client relationship had been created.
- Identifying whether the individual wished to be present at the hearing and if the allegedly incapacitated individual did not wish to be present at the hearing, the GAL would have to identify the reasons why the individual did not wish to be present.
- Identifying any barrier to attending hearings at the place where court was held or otherwise fully participating in the hearing, including the need for assistive technology, transportation, or other support and if the allegedly incapacitated individual wished to attend, the GAL would have to identify whether the individual had identified a plan for how the individual would attend.

- Identifying whether the individual planned to retain legal counsel or wanted appointed legal counsel and if the allegedly incapacitated individual did not plan to retain legal counsel or request appointed legal counsel, the GAL would have to make a recommendation as to whether legal counsel should be appointed.
- Identifying whether a disagreement or dispute related to the petition could be resolved through court ordered mediation.

The duties of a GAL appointed when an individual was alleged to be incapacitated or a legally incapacitated individual would have to include all the following, as applicable:

- Explaining to the individual the nature, purpose, and legal effects of a guardian's appointment.
- Explaining who had filed the petition and who, if anyone, had been nominated as guardian.
- Identifying whether the individual objected to the particular person proposed as guardian, if any.
- If a guardian were to be appointed, identifying a list of whom the individual would want to serve, in order of preference.
- If a guardian were to be appointed, identifying whom the individual would not want to serve.

Additionally, the GAL would have to explain to the individual the hearing procedure and the individual's rights during that procedure, described under House Bill 4911 (H-3), including the following:

- The right to contest the petition, in whole or in part.
- The right to request limits on the guardian's powers.
- The right to be present at the hearing or if the individual were unable to attend the hearing at the location court proceedings typically are held, including being informed by the GAL of his or her right for the hearing at another location.
- The right to request a reasonable accommodation to allow the individual to participate as fully as possible at the hearing, including with assistive technology or other support.
- The right to be represented by legal counsel of the individual's choice or if the individual were unable to secure legal counsel of his or her choice, the right to have legal counsel appointed by the court.
- The right to request an independent medical evaluation.

Also, the GAL would have to explain to the individual that if a guardian were appointed, the guardian could have the power to take certain actions on behalf of the individual. A GAL would have to inform the individual that a guardian could have any of the following powers and, if meaningful communication were possible, discern if the individual objected to a guardian having any of the following powers:

- Executing a do-not-resuscitate order.
- Executing a physician orders for scope of treatment form.
- Consenting to any medical treatment.
- Consenting to placement decisions, including moving the individual to a nursing facility or adult foster care home.
- Choosing whether the individual could marry or divorce.
- Handling any financial and property matters, including the sale or disposal of personal property and the maintenance of real property.

GAL Reporting Requirements

A GAL appointed for an individual alleged to be incapacitated or a legally incapacitated individual would have to file a written report with the court and in the form required by the SCAO subject to the provisions for contested and uncontested petitions described below. A GAL would have to file the report with the court and serve it on all interested persons at least five days before the date of the hearing. The court could order the report to be filed and served less than five days before the hearing only if the petition were made on an emergency basis described below.

The court could receive into evidence without testimony the GAL's written report if the report were filed with the court and served on all interested persons within five days of the hearing. The GAL would be required to report findings until the date of the termination of the GAL. The court could issue on its own initiative, or any interested person could secure, a subpoena to compel the preparer of the report to testify. The court would have to issue a subpoena to compel the preparer of the report to testify at the request of any interested person. The court could not order compensation of the GAL unless the GAL stated in the written report that the GAL complied with all the reporting requirements described under these provisions.

If an individual who were subject to an initial petition, a petition to terminate, or a petition to modify under Part 3 (Guardians of Incapacitated Individuals) *contested the petition*, the GAL's written report would have to include only the following information:

- That the individual contested the petition.
- Whether the individual had retained legal counsel or wished for legal counsel to be appointed.
- Whether the individual had any barriers to attending court at the place where it was usually held.
- If a guardian were appointed, who the individual would want to serve in order of preference.
- If a guardian were appointed, who the individual would not want to serve.
- An inventory of the reasonable number of items of personal or sentimental value belonging to the individual, such as photo albums, heirlooms, and collections.
- Any other information the GAL determined would be helpful to the court in ruling on the petition.

If an individual who was subject to an initial petition, a petition to terminate, or a petition to modify under Part 3 *did not contest the petition*, the GAL's report would have to include only the following:

- The date and time the GAL met with the individual.
- The length of time the GAL met with the individual.
- The location where the GAL met with the individual.
- Whether the GAL was able to meaningfully communicate with the individual and any barriers to communication.
- Who, if anyone, was present for the interview besides the individual.
- Whether the individual wished to be present at the hearing, and if the individual wished to be present but had a barrier to fully participating, the GAL would have to include whether the barrier could be resolved by moving the location of the hearing or using assistive technology, or both, or other support.
- Whether the individual had identified a plan for how the individual would attend.
- Whether the individual planned to retain legal counsel or had requested appointed legal counsel and if the individual had not indicated he or she wished to be represented by legal counsel, the GAL would have to include recommendation as to whether legal counsel should be appointed to represent the individual.

- Whether the individual had a power of attorney, a patient advocate designation, a physician orders for scope of treatment form, or a benefits payee, trustee, or other fiduciary.
- Whether a disagreement or dispute related to the petition might be resolved through court-ordered mediation.
- Whether the appointment of a visitor with appropriate knowledge, training, and education such as a social worker, mental health professional, or medical professional could provide the court with the information on whether alternatives to guardianship or a limited guardianship was appropriate.
- If a guardian were appointed, who the individual would want to serve in order of preference.
- If a guardian were appointed, who the individual would not want to serve.
- An estimate of the liquid assets, income, real property, and a description of personal property to the extent known after reasonable inquiry.
- Any other information the GAL determined would be helpful to the court in ruling on the petition.

"Liquid assets" would mean assets that can easily be converted into cash in a short amount of time. The term would include, cash, checking and savings accounts, money market instruments, certificates of deposit, mutual funds held in a taxable account, marketable securities, bonds, and the monetary value of life or other insurance. A retirement account would be considered a liquid asset once the individual's circumstances allowed him or her to withdraw cash without facing any Internal Revenue Service early withdrawal penalties.

If a GAL were appointed for any purpose other than an initial petition, a petition to terminate, or a petition to modify under Part 3, the GAL would have to provide a written report to the court that included, at a minimum, the information described in the reports for contested and uncontested petition described above, as applicable, and any other information required by law.

The court could not appoint a person that was previously appointed as a GAL as legal counsel for the individual if the GAL's report or recommendation to the court conflicted with the wishes of the individual.

Special Limited Guardian Ad Litem

After appointment or retention of legal counsel for the individual who was subject to a guardianship, the court could, for good cause shown, appoint a special limited GAL to provide information on a narrowly defined issue that would likely otherwise be inadequately addressed. A special limited GAL would be exempt from specific duties of a GAL described above. The court could order that a special limited GAL to provide a written report. The report would have to contain the information the court considered necessary to adequately address the issue leading to the appointment of the special limited GAL. A special limited GAL could not communicate directly with the individual who was subject to the petition and would have to instead communicate through legal counsel to the individual who was subject to the petition unless legal counsel otherwise gave consent.

Court Appointment or Retention of Legal Counsel

If an individual who were subject to a petition under Part 3 had not already secured legal counsel, the court would have to appoint legal counsel if any of the following applied:

- The individual requested legal counsel.

- The individual objected to any part of the petition for guardianship or potential authority of a guardian.
- The GAL determined it was in the individual's best interest to have legal counsel if legal counsel had not been secured.

Additionally, if the individual who were subject to the petition was indigent, the State would have to bear the expense of the appointed legal counsel if the GAL determined legal counsel was in the individual's best interest.

If an individual who were subject to a petition under Part 3 had legal counsel appointed or retained, the appointment of a GAL would terminate. The report of the GAL could not be admitted into evidence after the appearance or appointment of legal counsel for the individual who was subject to the petition. On request, the GAL could testify to the contents of the report.

The bill would specify that an individual alleged to be incapacitated would have the right to retain legal counsel of his or her choice at any stage, regardless of findings regarding his or her capacity. Retained legal counsel would have to file a substitution of legal counsel or a motion to substitute if legal counsel had already been appointed. Retained legal counsel would be entitled to reasonable attorney fees.

Visitation Requirements

Under EPIC, if meaningful communication is possible, a legally incapacitated individual's guardian must consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. Among other things, subject to the extent granted by court order, the guardian has the custody of the person of the ward and the power to establish the ward's place of residence in or outside of the State. The bill specifies that these provisions would be subject to a guardian's efforts to maintain a ward's permanent residence and remain consistent with the ward's preferences, as described below in Residence of Incapacitated Individual.

The Code requires a guardian to visit the ward within three months of the guardian's appointment and within three months after each previous visit. The bill would delete this provision.

Additionally, a guardian must notify the court within 14 days of a change in the ward's place of residence or the guardian's place of residence. The bill specifies that the notification only would apply to a change in the guardian's place of residence.

Under the bill, all the provisions described below would apply to the duty of the guardian to visit the ward.

The guardian would have to visit the ward in person within one month after the guardian's appointment and no less than once within three months after each in-person visit. The guardian also would have to visit the ward using audio and video technology, or if that technology were not available, only audio means, each month in which an in-person visit did not occur. If the ward were unable to communicate using audio and visual or audio-only means, the guardian would have to communicate with the ward's caregivers or any other party who was familiar with the ward's circumstances and could apprise the guardian of the ward's needs and progress. If the guardian determined that audio and visual visits or audio-only visits were not possible or that the ward was unable to communicate through audiovisual means, the records the guardian would have to maintain would have to also identify the

circumstances that required the guardian to rely on an audio-only visit or that required the guardian to consult with caregivers or others instead of communicating directly with the ward. The guardian would have to maintain records relating to the date, time, duration, and significant information for each required visit. The guardian would have to make the records available for the court's review and for review of interested persons.

If the guardian were a limited guardian, the visitation duties described above would apply; however, the limited guardian could seek approval from the court to conduct audiovisual or audio-only visits less often than monthly in the months in which the limited guardian was not visiting in person. The court could grant the request if the court found on the record that monthly audiovisual or audio-only visits in the months in which an in-person visit was not occurring were not necessary for the individual's well-being and best interests and identified on the record the individual's circumstances that led to that finding.

If the guardian were not a professional guardian, the guardian could delegate the required in-person visits described above to another person. The guardian would have to communicate with the person who conducted the in-person visit and maintain records regarding the information shared by the person who conducted the visit. If the guardian were an individual professional guardian, the professional guardian could not delegate the required in-person visits to another person.

Ward's Personal Items

Under EPIC, if entitled to custody of the ward, the guardian has the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian must secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time.

The bill specifies that the guardian would have to make a reasonable effort to identify a reasonable number of items of personal or sentimental value, including family heirlooms, photo albums, and collections. Within 56 days after appointment, the guardian would have to serve on all interested persons a list of the identified items. The list would have to be signed by the guardian and would have to include an attestation that states, "I represent this list is true and correct to the best of my knowledge, information, and belief at the time of signing. I understand that I must handle this property, like all of the ward's property for which I am responsible, consistent with my fiduciary duties. This may include sale, disposal, or other actions to meet my fiduciary duties. I am not responsible for storing any items at my own expense".

An interested person could petition the court for a hearing regarding the sale or disposition of the ward's property.

Guardian Powers when a Conservator is not Appointed

The Code specifies that if a conservator for the ward's estate is not appointed, the guardian has the power to do any all the following:

- Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward's welfare to perform that duty.
- Receive money and tangible property deliverable to the ward and apply the money and property for the ward's support, care, and education.

The bill would include in the list above a guardian's duty to allow interested persons to review proofs of income and disbursements at a time reasonably convenient to the guardian and interested persons.

Residence of Incapacitated Individual

The bill would require a guardian to maintain a legally incapacitated individual in the legally incapacitated individual's permanent residence, if possible, and consistent with the well-being and preferences of that individual.

"Permanent residence" would mean any of the following:

- The location the allegedly incapacitated individual or legally incapacitated individual uses as a permanent address, in which most of the individual's possessions are maintained.
- The location the allegedly incapacitated individual or legally incapacitated individual considers to be his or her home.

If a legally incapacitated individual were removed from his or her permanent residence temporarily for any reason, the guardian would have to make all reasonable efforts to return the legally incapacitated individual to his or her permanent residence at the earliest opportunity consistent with the legally incapacitated individual's wishes. Temporary removal of the legally incapacitated individual from his or her permanent residence for the purpose of receiving health care or supervision, for engaging in family or social activities, or for other reasons including the well-being or convenience of the legally incapacitated individual would not relieve the guardian of the obligations regarding permanent removal from the permanent residence. A guardian could not primarily consider the guardian's own convenience or benefit when making a decision to remove the legally incapacitated individual from the legally incapacitated individual's permanent residence or selecting a new residence for the legally incapacitated individual.

A guardian would have to explore reasonably available and affordable supports and services that could enable the legally incapacitated individual to remain in his or her permanent residence. If a guardian proposed to move the legally incapacitated individual from his or her permanent residence, the guardian would have to attempt to consult with the legally incapacitated individual and honor the legally incapacitated individual's preference to the greatest extent possible.

In exercising the guardian's power to establish the legally incapacitated individual's place of residence, the guardian would have to do the following:

- Select a residential setting the guardian believed the legally incapacitated individual would select if the legally incapacitated individual were able.
- Give priority to a residential setting in a location that would allow the legally incapacitated individual to interact with persons and participate in activities important to the legally incapacitated individual and meet the legally incapacitated individual's needs in the least restrictive manner reasonably feasible.

The bill specifies that if the guardian did not know and could not reasonably determine what setting the legally incapacitated individual would likely select, or the guardian reasonably believed the decision the legally incapacitated individual would make would unreasonably harm or endanger the welfare or personal or financial interests of the legally incapacitated individual, the guardian would have to choose a residential setting that is consistent with the legally incapacitated individual's best interest.

If a guardian removed a legally incapacitated individual from his or her permanent residence to another location in the State, the guardian would have to notify the court in writing within 14 days of the removal. The notification required would include the address of the new permanent residence.

A guardian could not move the legally incapacitated individual out of the State without order of the court. If the guardian petitioned to move the legally incapacitated individual out of the State, a GAL would have to be appointed and the court would have to schedule a hearing regardless of whether the individual filed objections or expressed dissatisfaction with the proposed move. If the legally incapacitated individual filed objections or expressed dissatisfaction with the proposed move, the court would have to appoint legal counsel if the legally incapacitated individual were not already represented by legal counsel.

Subject to moving a legally incapacitated individual to protect his or her health, safety, or welfare, or to a health care facility intended to be temporary, and except if the permanent residence became permanently unavailable, a professional guardian could not permanently remove a legally incapacitated individual from the legally incapacitated individual's permanent residence unless the professional guardian filed a petition and the court granted the petition, described below. A petition to move a ward's permanent residence would have to be separate from the petition for a finding of incapacity and appointment of guardian. The petition would have to include all the following information:

- The individual's current permanent residence.
- The proposed new residence.
- The reason for the proposed move.
- Whether the move was to a more or less restrictive setting.
- The efforts made or resources explored to enable the individual to remain in his or her current permanent residence.
- Whether the guardian engaged in meaningful communication with the individual about the proposed move.
- Whether the individual objected to or supported the proposed move.

If the person petitioning for guardianship proposed or anticipated that a professional guardian were going to be appointed, the petitioner or any interested person that believed that it was necessary for the well-being of the alleged incapacitated individual to move the individual permanently from his or her permanent residence could file a petition described above seeking authority for a professional guardian, if appointed, to permanently remove the alleged incapacitated individual from his or her permanent residence.

If a professional guardian determined that to protect the health, safety, or welfare of the legally incapacitated individual, it was necessary to move the ward from his or her permanent residence to another residence the professional guardian intended to be permanent before obtaining court approval, the professional guardian could move the legally incapacitated individual. Within 14 days after moving the legally incapacitated individual, the professional guardian would have to file the petition for a move of permanent residence. The petition would have to include the circumstances that the professional guardian determined were necessary to move the legally incapacitated individual before required filing.

If, after a temporary stay in a health care facility or at a residence the professional guardian initially intended to be temporary, the professional guardian determined that it was necessary to change to the permanent residence of the legally incapacitated individual, the professional guardian would have to file a petition for permanent removal, within 14 days after making

the determination. The petition would have to include the circumstances underlying the professional guardian's determination.

If a petition for removal from the permanent residence had been filed, the court would have to promptly appoint a GAL and hold the hearing within 28 days of the petition being filed. The GAL would have to, in addition to the other required duties of a GAL described above, do all the following:

- Advise the individual that a petition had been filed to move the individual from his or her permanent residence to the new residence identified in the petition or another location the court determined was appropriate.
- Explain that if the court granted the petition to move the individual, the guardian would have the authority to change the individual's permanent residence to the location specified in the petition or to another location the court determined was appropriate.
- Ascertain, if possible, the wishes of the individual to remain in his or her permanent residence.
- Include a summary of the discussion in the GAL's written report.

If the alleged incapacitated individual or legally incapacitated individual did not already have legal counsel, the court would have to appoint legal counsel if the individual filed an objection to the petition for authority to move the individual from his or her permanent residence or if the GAL's report stated that the individual objected to being removed from his or her permanent residence.

The court could not grant a petition for removal from the permanent residence unless the court, after due consideration and opportunity for testimony on the matter, determined by clear and convincing evidence that moving the legally incapacitated individual from the permanent residence to the residence identified in the petition was at least necessary to protect the individual's physical health, safety, or welfare or consistent with the individual's wishes.

If the legally incapacitated individual had to leave the permanent residence because the residence became permanently unavailable, the professional guardian would have to provide at least 14 days' prior written notice to the legally incapacitated individual, if possible, under the circumstances or, if less time were available before the legally incapacitated individual had to move, notice at the earliest opportunity. The professional guardian would have to provide written notice to the court and all interested persons within 14 days after the move explaining the following:

- Why the permanent residence was no longer available.
- Whether the professional guardian attempted to consult with the legally incapacitated individual about where the legally incapacitated individual wanted to move.
- Whether the professional guardian honored the legally incapacitated individual's preferences regarding where he or she wanted to move.
- The address of the new residence
- The type of residence.
- How the new residence would meet the legally incapacitated individual's needs.

A residence would be considered to have become permanently unavailable as a result of a facility closure, removal of the property from the rental market, involuntary discharge, notice to quit, or eviction that could not be appropriately resolved by the professional guardian, irreparable damage to the permanent residence, or other circumstances that were not

initiated by the professional guardian but necessitate the permanent removal of the legally incapacitated individual from his or her permanent residence.

If the legally incapacitated individual's residence became permanently unavailable, the professional guardian would not be required to file a permanent removal petition and the court would not be required to appoint a GAL or legal counsel or hold a hearing.

If removal from the permanent residence necessitated the sale, transfer, or disposal of real property or sentimental personal property and if meaningful communication were possible, the guardian would have to consult with the legally incapacitated individual before taking any action to dispose of the property. A guardian would have to make all reasonable efforts to identify and honor the legally incapacitated individual's wishes to preserve sentimental personal property in the overall context of the legally incapacitated individual's estate, including items identified in the inventory, and would have to take reasonable steps to safeguard that personal property. The court could remove a guardian that failed to comply with this provision.

Conservator Appointment or Appointment for Protective Order

Under EPIC, on receipt of a petition for a conservator's appointment or another protective order because of minority, the court must set a date for hearing. If the court determines that the minor's interests are or may be inadequately represented, the court may appoint an attorney to represent the minor, giving consideration to the minor's choice if 14 years of age or older. An attorney appointed by the court to represent a minor has the powers and duties of a GAL (generally, referred to as lawyer guardian ad litem (LGAL)).

Under the bill, the duties of a GAL appointed for an individual alleged to need protection or a protected individual would include all the following, as applicable:

- Explaining to the individual the nature, purpose, and legal effects of a conservator's appointment or issuance of a protective order.
- Explaining who had filed the petition and who, if anyone, had been nominated as conservator, if applicable.
- Explaining to the individual that if a conservator were appointed, the conservator could have the power to take certain actions on behalf of the individual; a GAL would have to inform the individual that a conservator could have any of the powers described in Section 5407¹ and, if meaningful communication were possible, discern if the individual objected to a conservator having any of those powers.
- Identify whether the individual objected to the particular person proposed as conservator, if any.
- If a conservator were to be appointed, identify a list of who the individual would want to serve, in order of preference.
- If a conservator were to be appointed, identify who the individual would not want to serve.

Also, the GAL's duties would include explaining to the individual the hearing procedure and the individual's rights in the hearing procedure, including, the following:

- The right to contest the petition, in whole or in part.
- The right to request limits on the conservator's powers.

¹ Section 5407 allows a court to have certain powers over the estate and business affairs that an individual could exercise if present and not under disability, except the power to make a will.

- The right to be present at the hearing; if the individual were unable to attend the hearing at the location court proceedings typically are held, the GAL would have to inform the individual of his or her right to have the hearing at another location.
- The right to request a reasonable accommodation to allow the individual to participate as fully as possible at the hearing, including with assistive technology or other support.
- The right to be represented by legal counsel of the individual's choice; if the individual was unable to secure legal counsel of his or her choice, the GAL would have to explain to the individual that he or she had the right to have legal counsel appointed by the court.
- The right to request an independent medical evaluation.

Subject to the duties described above, the duties of a GAL appointed upon receipt of a petition for conservator appointment or another protective order for a reason other than minority would include the following:

- Impartially gathering information as provided by law.
- Seeking information from the individual and, if communication were possible, communicating in a manner the individual was best able to understand; if communication were not possible or there was a barrier to communication, the GAL would have to note that in the report.
- Interviewing the individual in person at the individual's location and out of the presence of any interested person.
- Advising the individual that the GAL did not represent the individual as an attorney and that no attorney-client relationship had been created.
- Identifying whether the individual wished to be present at the hearing; if the individual alleged to need protection did not wish to be present at the hearing, the GAL would have to identify the reasons why the individual did not wish to be present.
- Identifying any barrier to attending hearings at the place where court was held or otherwise fully participating in the hearing, including the need for assistive technology, transportation, or other support; if the individual alleged to need protection wished to attend, the GAL would have to identify whether the individual had identified a plan for how the individual would attend.
- Identifying whether the individual planned to retain legal counsel or wanted to appoint legal counsel; if the individual alleged to need protection did not plan to retain legal counsel or request appointed legal counsel, the GAL would have to make a recommendation as to whether legal counsel should be appointed.
- Identifying whether a disagreement or dispute related to the petition could be resolved through court-ordered mediation.

Written Report for Protection of Property of an Individual; Conservatorship

Under the bill, a GAL appointed for an individual alleged to need protection or a protected individual would have to file a written report with the court in the form required by the SCAO. If an individual who were subject to an initial petition under Part 4, a petition to terminate under Part 4, or a petition to modify under Part 4 *contested the petition*, the GAL's written report would have to include only the following:

- That the individual contested the petition.
- Whether the individual had retained legal counsel or wished for legal counsel to be appointed.
- Whether the individual had any barriers to attending court at the place where it was usually held.

If an individual who were subject to an initial petition, a petition to terminate, or a petition to modify under Part 4 *did not contest the petition*, the GAL's written report could include only the following:

- The date and time the GAL met with the individual.
- The length of time the GAL met with the individual.
- The location where the GAL met with the individual.
- Whether the GAL was able to meaningfully communicate with the individual and any barriers to communication.
- Who, if anyone, was present for the interview besides the individual.
- Whether the individual wished to be present at the hearing; if the individual wished to be present at the hearing but had a barrier to fully participating, the GAL would have to include in the written report whether the barrier could be resolved by moving the location of the hearing or using assistive technology, or both, or other support.
- Whether the individual had identified a plan for how the individual would attend.
- Whether the individual planned to retain legal counsel or had requested appointed legal counsel; if the individual had not indicated he or she wished to be represented by legal counsel, the GAL would have to include in the written report a recommendation as to whether legal counsel should be appointed to represent the individual.
- Whether the individual had a power of attorney, a patient advocate designation, a physician orders for scope of treatment form, or a benefits payee, trustee, or other fiduciary.
- Whether a disagreement or dispute related to the conservatorship petition might be resolved through court-ordered mediation.
- Whether the appointment of a visitor with appropriate knowledge, training, and education such as a social worker, mental health professional, or medical professional could provide the court with the information on whether alternatives to conservatorship or a limited conservatorship under Section 5419(1) was appropriate.²
- For an initial petition, if a conservator were appointed, who the individual would want to serve in order of preference.
- For an initial petition, if a conservator were appointed, who the individual would not want to serve.
- An estimate of the liquid assets, income, real property, and a description of personal property to the extent known after reasonable inquiry.
- An inventory of the reasonable number of items of personal or sentimental value belonging to the individual, such as photo albums, heirlooms, or collections.

If a GAL were appointed for any purpose other than an initial petition, a petition to terminate, or a petition to modify under Part 4, the GAL would have to provide a written report to the court that included, at a minimum, the information required in Conservator Appointment or Appointment for Protective Order and above, as applicable, and any other information required by law.

The court could receive into evidence without testimony the written report of the GAL if the report were filed with the court and served on all interested persons within five days before the hearing. The GAL would have to report findings until the date of the termination of the GAL. The court could issue on its own initiative, or any interested person could secure, a

² Section 5419(1) specifies that appointment of a conservator makes the conservator trustee to all the protected individual's property, or to the part of that property specified in the order, held at the time of or acquired after the order, including title to property held for the protected individual by a custodian or attorney-in-fact. An order specifying that only a part of the protected individual's property vests in the conservator creates a limited conservatorship.

subpoena to compel the preparer of the report to testify. On request of any interested person, the court would have to issue a subpoena to compel the preparer of the report to testify.

A GAL would have to file any report with the court and serve the report on all interested persons within five days of the hearing. The court could not order compensation of the GAL unless the GAL stated in the written report that the GAL complied with these provisions.

The court could not appoint a GAL as legal counsel for the individual if the GAL's report or recommendation to the court conflicted with the wishes of the individual. If an individual who were subject to a petition under Part 4 had not already secured legal counsel, the court would have to appoint legal counsel if any of the following applied:

- The individual who was subject to the petition requested legal counsel.
- The individual who was subject to the petition objected to any part of the petition for conservatorship or potential authority of a conservator.
- The GAL determined it was in the best interest of the individual subject to the petition to have legal counsel; if legal counsel had not been secured, the court would have to appoint legal counsel.

The bill specifies that if the individual who were subject to the petition was indigent, the State would have to bear the expense of appointed legal counsel.

If an individual who were subject to a petition under Part 4 had legal counsel appointed or retained, the appointment of a GAL would terminate. The GAL's report could not be admitted into evidence after the appearance or appointment of legal counsel for the individual who was subject to the petition

Special Guardian Ad Litem of Individual; Conservatorship

Under the bill, after appointment or retention of legal counsel for the individual who was subject to the petition under Part 4, the court could, for good cause shown, appoint a special limited GAL to provide information on a narrowly defined issue that would likely otherwise be inadequately addressed. A special GAL would be exempt from the general duties of a GAL. A special limited GAL could not communicate directly with the individual who was subject to the petition and would have to communicate instead through legal counsel to the individual who was subject to the petition, unless legal counsel otherwise gave consent.

A special limited GAL would not be required to provide a written report. The court could order a special limited GAL to provide a written report. A special GAL's report would have to contain the information the court considered necessary to adequately address the issue leading to the appointment of the special limited GAL.

Inventory of Estate; Conservatorship

Under EPIC, within 56 days after appointment, unless otherwise specified by court rule, a conservator must prepare and file a complete inventory of an estate subject to conservatorship and an oath or affirmation confirming the accuracy and completeness of the file. Conservators are generally required to provide a copy of the inventory to the protected individual and keep suitable records of the administration and exhibit those records on the request of an interested person. The bill would require that the conservator to serve on interested persons, along with the inventory, account statements with redacted account numbers that reflected the value of depository and investment accounts dated within 30 days of the inventory's date. The inventory would have to be served on all interested persons. Any

interested person could file an objection to the inventory with the court and serve the objection on all other interested persons. The court would have to set the matter for hearing.

Additionally, the conservator would have to make reasonable efforts to identify a reasonable number of items of special personal or sentimental value, including, family heirlooms, photo albums, or collections on the inventory. To the extent meaningful conversation permitted, the conservator would have to make an inquiry with the protected individual as to what items the protected individual identified as having special personal or sentimental value. If the conservator were unable to locate an item identified as having special personal or sentimental value at the time of filing the inventory, the conservator would have to state that on the inventory.

The inventory would have to be signed by the conservator and include an attestation that stated, "I represent this list is true and correct to the best of my knowledge, information, and belief at the time of signing. I understand that I must handle this property, like all of the protected individual's property, consistent with my fiduciary duties. This may include sale, disposal, or other actions to meet my fiduciary duties. I am not responsible for storing any items at my expense."

An interested person could petition the court for a hearing regarding the sale or disposition of the ward's property.

A conservator would have to make all reasonable efforts to identify and honor the protected individual's wishes to preserve items of special personal or sentimental value in the overall context of the protected individual's estate, including items identified in the inventory and annual accounts, and would have to take reasonable steps to safeguard the property. The court could remove a conservator that failed to comply with these requirements. These provisions would not apply to a financial institution appointed as a professional conservator.

The inventory would have to list any merchandise, funeral services, cemetery services, or prepaid contracts for which the protected individual or conservator was the contract buyer or contract beneficiary under the Prepaid Funeral and Cemetery Sales Act.³ If the conservatorship estate included assets described above, the conservator would have to file all the following with the inventory:

- A copy of any prepaid contract under the Prepaid Funeral and Cemetery Sales Act.
- Proof that payments made under a prepaid contract were held in escrow or under a trust agreement in compliance with the Prepaid Funeral and Cemetery Sales Act.
- The most recent escrow statement issued concerning the prepaid contract.
- Proof of any assignments of life policies or annuity contracts made to purchase merchandise, funeral services, or cemetery services under the Prepaid Funeral and Cemetery Sales Act would have to list property with reasonable detail and the type and amount of any encumbrance.

Administration of a Trust; Conservatorship

The Code requires a conservator to account to the court for administration of the trust at least annually unless the court directs otherwise, upon resignation or removal, and at other times as the court directs. On termination of the protected individual's minority or disability, a conservator must account to the court or to the formerly protected individual or that

³ The Prepaid Funeral and Cemetery Sales Act regulates the sale and provision of funeral and cemetery merchandise, including specifying contracts for prepayment of services.

individual's successors. The bill specifies that the conservator would have to account such information to the court within 56 days of the termination.

Additionally, the conservator would have to serve on interested persons, along with the account, account statements with account numbers redacted that reflected the value of depository and investment accounts dated no later than 30 days after the inventory's date and receipts, invoices, or other documentation for expenses greater than \$1,000. The account would have to be in the form as provided by the SCAO. The account would have to detail assets including those identified in the inventory described above, debts, gross income, and expenses.

If the conservator had disposed of or sold any of the items, the conservator would have to describe on the account how the conservator fulfilled the conservator's duties to make reasonable efforts to identify special or personal items on the inventory and honor the protected individual wishes pertaining to such items.

If the protected individual's estate included any merchandise, funeral services, cemetery services, or prepaid contracts for which the protected individual or conservator was the contract buyer or contract beneficiary under the Prepaid Funeral and Cemetery Sales Act, the conservator would have to file all the following with the account:

- A copy of any prepaid contract under the Prepaid Funeral and Cemetery Sales Act.
- Proof that payments made under a prepaid contract were held in escrow or under a trust agreement in compliance with the Prepaid Funeral and Cemetery Sales Act.
- The most recent escrow statement issued concerning the prepaid contract.
- Proof of any assignments of life policies or annuity contracts made to purchase merchandise, funeral services, or cemetery services under the Prepaid Funeral and Cemetery Sales Act.

If the protected individual objected to an account, the court would have to appoint a GAL to visit the protected individual in the same manner as a GAL prescribed above. The court would have to appoint legal counsel to represent the protected individual if any of the following were met:

- The protected individual requested legal counsel.
- The GAL believed that appointment of legal counsel was in the best interest of the protected individual.
- The court otherwise believed it was necessary to protect the interest of the protected individual.

House Bill 4911 (S-1)

Petition for Finding of Incapacity

Under EPIC, an individual on the individual's own behalf, or any person interested in the individual's welfare, may petition for a finding of incapacity and appointment of a guardian or a standby guardian. At the filing of a petition the court must set a date for a hearing. Unless the allegedly incapacitated individual has legal counsel of his or her own choice, the court must appoint a GAL to represent the person in the proceeding. The bill specifies that this provision would apply to setting a date for an initial hearing. Additionally, the court could enter a final order on the petition at the initial hearing if the court did not set a trial date.

The court would have to set a trial date within seven days of the initial petition hearing if any of the following applied:

- The GAL requested that the proceeding be set for trial.
- The allegedly incapacitated individual or his or her counsel requested that the matter be set for trial.
- The court determined that the trial date should be set for any other reason as justice required.

If the court set a trial date at the initial petition hearing, the court would have to do the following:

- Enter a scheduling order to the extent necessary.
- Enter an order that provided, to the extent practicable, for the attendance of the allegedly incapacitated individual at the trial if the allegedly incapacitated individual wished to attend.

An order entered as described above could order any interested person over whom the court has jurisdiction to facilitate attendance or move the hearing site.

Evaluation to Determine Incapacity

Under EPIC, if necessary, the court may order an individual alleged to be incapacitated to be examined by a physician or mental health professional. The individual has the right to secure an independent evaluation at his or her own expense, or if indigent, at the expense of the State. The bill specifies that an independent evaluation performed at the expense of the State would have to be performed by a physician or a mental health professional.

Currently, the examination report must contain all the following:

- A detailed description of the individual's physical or psychological infirmities.
- An explanation of how and to what extent each infirmity interferes with the individual's ability to receive and evaluate information in making decisions.
- A listing of all medications the individual is receiving, the dosage of each medication, and a description of the effects each medication has on the individual's behavior.
- A prognosis for improvement in the individual's condition and a recommendation for the most appropriate rehabilitation plan.
- The signatures of all individuals who performed the evaluations upon which the report is based.

Instead, under the bill, the report would have to contain all the following, and if the court found that the report did not substantially comply with the requirements described below, the court could not consider evaluation:

- A detailed description of the individual's cognitive and functional abilities and limitations.
- An explanation of how and to what extent the individual was able to receive, understand, participate in, and evaluate information in making decisions.
- If the report were being completed by a physician or mental health professional, a listing of all medications the individual is receiving, the dosage of each medication, and a description of the effects each medication had upon the individual's behavior.
- If the report were being completed by a physician or mental health professional, a prognosis for improvement in the individual's condition, including whether it was a

permanent or temporary condition, and a recommendation for the most appropriate rehabilitation plan.

- The signatures and printed names of all individuals who performed the evaluations, where they were employed, the date of examination on which the report was based, the length of time they have known the individual, and the length of time they met with the individual.
- Whether the individual had the capacity to assign or delegate responsibilities to ensure the individual's well-being.
- Whether the individual had executed a document directing care or naming an agent to act on the individual's behalf, including a power of attorney, patient advocate designation, or do-not-resuscitate order.
- If the report were being completed by a visitor, it also would have to include an assessment of the existence of current formal and informal supports, the ability of supportive services and benefits to meet any unmet needs, the identification of any existing concerns regarding the individual's well-being, and the individual's ability to address those existing concerns.

Appointment upon Finding of Incapacity and Need of Care and Supervision

Under EPIC, the court may appoint a guardian or standby guardian if the court finds by clear and convincing evidence that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record.

Alternatively, the court may dismiss the proceeding or enter another appropriate order. The bill would delete this provision and instead specify that the court would have to dismiss the proceeding if the court could not be shown the following by a clear and convincing evidence:

- That the individual for whom a guardian was sought was an incapacitated individual.
- That the appointment was necessary as a means of providing continuing care and supervision of the individual.

Under the bill, at any time during the proceedings to show incapacity, the court could stay the guardianship proceedings for a reasonable period, based on the needs of the individual, to allow the individual the opportunity to explore the alternatives to appointment of a guardian. If the individual properly named a patient advocate under a patient advocate designation, an attorney in fact under a power of attorney, or a representative payee under a governmental benefit during the stay and provided evidence of naming the patient advocate, attorney in fact, or representative payee to the court, the court could dismiss the petition with or without a hearing. The bill specifies that this provision would not prevent the court from ordering a temporary guardianship under House Bill 4912 (H-3) if the temporary guardianship were limited in scope and the court explicitly found that the individual had the capacity to execute a power of attorney or patient advocate designation, or to designate a representative payee.

The Code prescribes the rights for individuals for whom a guardian or standby guardian is sought or appointed as described above. Generally, these rights include the ability to object to a successor guardian, petition for the individual's own guardian, attend hearings, and seek periodic review or modification of the guardianship, among other things. The individual also has a right to have legal counsel of his or her own choice to represent him or her on the petition to appoint a guardian. The bill would add that, if applicable, the individual's own legal counsel could represent the individual on a professional guardian's petition to permanently

remove the individual from the individual's permanent residence under House Bill 4910 (H-3).

The bill also specifies the individual's rights to visits modified under House Bill 4910 (H-3). Currently, the individual has a right to quarterly visits. The bill would modify this provision to specify that the individual would have rights to visits as described in House Bill 4910 (H-3). Additionally, the bill would include provisions from House Bill 4910 (H-3) to specify that the individual under a guardianship would have a right to have the guardian notify the court within 14 days after a change in the individual's permanent residence. Additionally, if the guardian were a professional guardian, the bill would prescribe the individual's right to have the court consider a separate petition if the guardian sought to move the individual to a new permanent residence.

Emergency Guardian Appointment

Under EPIC, if an individual does not have a guardian, an emergency exists, and no other person appears to have authority to act in the circumstances, the court must provide notice to the individual alleged to be incapacitated and must hold a hearing. Upon a showing that the individual is an incapacitated individual, the court may exercise the power of a guardian, or appoint a temporary guardian with only the powers and for the period of time as ordered by the court. A hearing with notice as provided in Section 5311 must be held within 28 days after the court has acted under this provision.⁴

If an appointed guardian is not effectively performing the guardian's duties and the court further finds that the legally incapacitated individual's welfare requires immediate action, the court may appoint, with or without notice, a temporary guardian for the legally incapacitated individual for a specified period not to exceed six months.

A temporary guardian is entitled to the care and custody of the ward, and the authority of a permanent guardian previously appointed by the court is suspended as long as a temporary guardian has authority. A temporary guardian may be removed at any time and must make reports as the court requires.

The bill would delete the provisions described above.

Under the bill, an interested person could file a petition to appoint an emergency guardian for an allegedly incapacitated individual. If a petition to appoint an emergency guardian were filed, the petitioner would have to give notice, except under certain conditions shown by affidavit described below and the court would have to appoint a GAL under House Bill 4910 (H-3). The court would have to conduct a hearing on the emergency appointment petition as soon as possible and within seven days after the court received the petition. Unless otherwise provided below, following the hearing, the court could appoint an emergency guardian if the court found by a preponderance of the evidence that all the following applied:

- An emergency existed that was likely to result in substantial harm to the allegedly incapacitated individual's physical health, safety, or welfare.
- No other person appeared to have authority to act in the circumstances.

⁴ Section 5311 prescribes the procedure to appoint or remove a guardian and specifies that notice of a hearing must be given to the ward or incapacitated individual, the person serving as the guardian or conservator, any known named attorney under a durable power of attorney, or if none at least one of the individuals closest adult relatives.

- There was a basis that both the individual was an incapacitated individual and appointment of an emergency guardian was necessary as a means of providing continuing care and supervision of the individual.

The bill specifies that on the filing of a petition to appoint an emergency guardian, the court could appoint an emergency guardian for an allegedly incapacitated individual without notice to the allegedly incapacitated individual only if the court determined from an affidavit showing, by clear and convincing evidence, that all the following applied:

- An emergency existed that was likely to result in imminent and substantial harm to the allegedly incapacitated individual's physical health, safety, or welfare.
- No other person appeared to have authority to act in the circumstances.
- There was a basis that the individual was an incapacitated individual and appointment of an emergency guardian was necessary as a means of providing continuing care and supervision of the individual.

If the court appointed an emergency guardian as described above, the court would have to do all the following:

- Appoint a GAL for the allegedly incapacitated individual.
- Within 48 hours after the appointment of an emergency guardian, order the petitioner to give notice by personal service of the appointment to the allegedly incapacitated individual and service as required by court rule to all interested persons.
- Within seven days after the appointment of an emergency guardian, hold a hearing on whether the conditions for the appointment of the emergency guardian existed.

If the court found that conditions existed for the appointment of the emergency guardian at a hearing, and the individual wished to contest the appointment, the court would have to set a date for a hearing and enter an order consistent with the provisions under Appointment upon Finding of Incapacity and Need of Care and Supervision.

An order appointing an emergency guardian would expire 28 days after the appointment; however, the court could extend the order once for an additional 28 days if the court found by a preponderance of the evidence, upon an affidavit by the appointed emergency guardian or following a hearing set at the discretion of the court, that the conditions that led to the appointment of the emergency guardian still existed.

An emergency guardian could exercise only the powers specified by the court. The court could remove an emergency guardian at any time. An appointment of an emergency guardian would not be a determination that a basis existed for an appointment of a guardian under Petition for Finding of Incapacity.

Scope

In relation to powers conferred under Part 3 or implicit in the title acquired by virtue of the proceeding, a conservator must act as a fiduciary and observe the standard of care applicable to a trustee. Under the bill, a conservator for an individual who was subject to a conservatorship for a reason other than minority would have the duty to take all steps within the scope of the conservator's authority to ensure the individual attended any hearing concerning the individual's conservatorship if the individual wished to attend the hearing in a manner as provided under House Bill 4910 (H-3).

House Bill 4912 (S-1)

Temporary Guardian Appointment

The bill would amend EPIC to allow a court to appoint a temporary guardian under Section 5301a or as described below.⁵ If a temporary guardian was appointed, a trial on a permanent basis would have to be scheduled using the same procedures for an appointment of a guardian. The trial would have to take place within 28 days after the appointment of the temporary guardian.

If a guardian were not appointed or an appointed guardian were not effectively performing the guardian's duties and the court found that the alleged incapacitated individual or ward's welfare required immediate action the court could appoint a temporary guardian for a specified period that could not exceed six months. The court could not appoint a temporary guardian unless either of the following conditions were met:

- Oral or written notice of the hearing was provided to all interested persons.
- If the petitioner had not provided notice of the hearing to all interested persons, the petitioner would have to submit a written explanation to the court to detail the efforts, if any, that the petitioner had made to provide notice and the reason why provided notice should not be required.

A temporary guardian would be entitled to the care and custody of the ward, and the authority of a permanent guardian previously appointed by the court would be suspended while a temporary guardian had authority. A temporary guardian could be removed at any time. A temporary guardian would have to make reports as the court required. In other respects, the provisions of EPIC concerning guardians would apply to temporary guardians.

If a temporary guardian were appointed, except as otherwise provided, a trial on a permanent appointment would have to be scheduled using the same procedures for an initial hearing for guardianship as proposed by House Bill 4911 (S-1).

Petition of Conservator

Under EPIC, the court may remove a conservator for good cause, on notice and hearing, or accept a conservator's resignation. On the conservator's death, resignation, or removal, the court may appoint another conservator. A subsequent conservator succeeds to the title and powers of the predecessor. The bill specifies that conservator appointment would be subject to priority proposed by House Bill 4909 (H-3).

The bill would allow the protected individual, or a person interested in the protected individual's welfare, to petition for an order removing the conservator, appointing a successor conservator, modifying the terms of the conservatorship, or terminating the conservatorship. A request for this order could be made by informal letter to the court. A person who knowingly interfered with transmission of such a request to the court would be subject to a finding of contempt of court. A petition for an order appointing a successor conservator also would be subject to the priority of appointment specified under House Bill 4909 (H-3).

BACKGROUND

Generally, a guardian or conservator is appointed through the probate court system and is obligated to act in the best interest of the individual for whom the guardian or conservator is

⁵ Section 5301a allows for the appointment of a guardian in another state as a temporary guardian.

appointed. Appointments arise at the request of a concerned individual filing a petition to the court in which the individual alleged to be incapacitated is located. Generally, anyone at least 18 years old and willing to serve may fill the role of guardian or conservator. In some cases, a court may appoint a professional guardian or professional conservator.

Guardians are granted legal decision-making power on the grounds of that individual being determined as a "legally incapacitated individual", meaning the individual is determined as not able to make legal decisions for oneself. Commonly, guardians are appointed for the elderly, minors without guardians, and individuals who are unable to make decisions due to a mental illness or disability. Guardians can have total or partial control over decision-making for a legally incapacitated individual. In some cases someone who is legally incapacitated will need a guardian and a conservator. Conservators are responsible for managing a legally protected individual's property and financial matters. In many cases a guardianship and a conservatorship are managed by the same person. If the legally protected individual has a large estate or significant finances, the role of a conservator is sometimes given to an attorney.⁶

FISCAL IMPACT

The bills would have an indeterminate fiscal impact on the State and local court systems. While the bills would not increase or decrease guardian or conservator filings, per se, they would change requirements and procedures for those assignment, adding a licensure requirement for professional guardians and conservators, modifying requirements for temporary assignments, and requiring a trial for temporary guardian appointments under sections 5301a and 5312a.

For context, the table below shows the number of total caseloads for guardians and conservators at the end of each calendar year from 2019 through 2023. These caseloads are relatively stable from year to year, even through the pandemic.

	Adults with a Guardian	Adults with a Conservator	Minors with a Guardian	Minors with a Conservator	Developmentally Disabled Persons with a Guardian
2019	33,807	11,670	19,878	5,553	29,784
2020	30,412	10,989	18,068	5,229	27,679
2021	30,867	11,103	16,038	5,382	29,421
2022	31,801	11,135	15,976	5,532	30,103
2023	32,034	10,997	15,963	5,388	30,795

SAS\S2324\s4909sa

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

⁶ "Probate Information", State Bar of Michigan, https://www.michbar.org/public_resources/probate_guardianship. Retrieved 5-7-24.